In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-422

INTERNATIONAL ENGINEERING COMPANY, ETC., PETITIONER

v.

DONALD H. RUMSFELD
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that this action arose out of a breach of contract and was cognizable only in the Court of Claims.

On July 7, 1969, the Air Force entered into a contract with petitioner International Engineering Company for the design, construction, and testing of a model of a long-range navigation bomb/missile guidance system, the performance of certain laboratory and helicopter flight tests, and the delivery of a final report analyzing the results of the tests (Pet. App. A-1 to A-2). Pursuant to the Armed Services Procurement Regulations ("ASPR"), 32 C.F.R. 1.100, *et seq.*, the contracting officer incorporated by reference in the agreement some 44 standardized ASPR contractual provisions, including the standard "Rights in Technical Data" clause, ASPR 7.104-9(a), and the "disputes" clause, ASPR 7.103-12, which

establishes a mechanism for resolving contractual disagreements (Pet. App. A-2).

In March 1971, the Air Force requested that petitioner provide further information required under the contract concerning the components and processes of the system in order to facilitate evaluation of the test results (Pet. App. A-2). Petitioner submitted this data both in an interim report and in final report No. 70-06-4. Pursuant to the procedure established by the Rights in Technical Data clause, both reports bore a "limited rights" legend, which, if justifiably affixed, would have prevented the Air Force from disseminating this information to any person not within the government (Pet. App. A-2). The contracting officer questioned the propriety of the legend and requested that petitionner furnish substantiating information, as required by that contractual provision.[1] Petitioner responded that the unit incorporating its alleged trade secrets had been developed at its own expense and that it therefore possessed the right to limit distribution of that information (Pet. App. A-2).

On December 10, 1971, petitioner submitted its final report No. 71-09 under the last modification of the contract. This report contained a limited rights legend with regard to the same data as before (Pet. App. A-3). The contracting officer notified petitioner that pursuant to the Rights in Technical Data clause, the report would not be accepted unless petitioner either removed or substantiated its

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[1]The Rights in Technical Data clause places the burden of substantiating the propriety of restrictive legends on the contractor since all pertinent records are in its possession and many important details concerning the development of proprietary information are known only to its employees (Pet. App. A-5, n. 2).

proprietary markings (Pet. App. A-3). After lengthy correspondence and a series of meetings, the contracting officer found that the statements submitted by petitioner had not substantiated the propriety of the legend (Pet. App. A-4 to A-5).[2]

On the day after it was informed of this decision, petitioner instituted this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief from the contracting officer's decision. Petitioner alleged that that decision constituted final agency action reviewable under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702 ("APA"), and that the contracting officer's actions were unlawful (Pet. App. A-5). The district court held that it had jurisdiction over the action and ordered the contracting officer to submit a more detailed explanation of his reasons for determining that the limited rights legend should be deleted (Pet. App. D-1 to D-12). Upon consideration of his report, the district court issued a preliminary injunction prohibiting removal of the legend (Pet. App. B-1 to B-30).

The court of appeals reversed and remanded with instructions to vacate the injunction and dismiss the case for lack of subject matter jurisdiction (Pet. App. A-1 to A-15). Concluding that, in essence, the complaint stated a claim for breach of contract (Pet. App. A-9), the court held that the decision of the contracting officer did not constitute agency action and that the waiver of sovereign immunity contained in the APA was therefore inapplicable (Pet. App. A-12 to A-13). It reasoned that a finding

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[2]The Air Force agreed to treat the data as if it possessed limited rights, pending the district court's ruling on the motion for a preliminary injunction.

that the APA applied under these circumstances would significantly impair the jurisdiction of the Court of Claims (Pet. App. A-9). The court further held that under 5 U.S.C. 704, the district court in any event lacked jurisdiction because petitioner possessed an adequate remedy in another court (Pet. App. A-14). The court of appeals therefore concluded that petitioner's sole remedy was to file suit in the Court of Claims under the Tucker Act.

1. The United States cannot be sued without its consent, but when Congress elects to waive its sovereign immunity, that consent may be subject to appropriate conditions. *United States* v. *Sherwood*, 312 U.S. 584. Under the Tucker Act, 28 U.S.C. 1346(a) and 1491, the United States has submitted to suit in contract actions under limited circumstances. The Court of Claims and the district courts have concurrent jurisdiction over claims of less than $10,000;[3] but the Court of Claims has exclusive jurisdiction of claims for over $10,000. Its jurisdiction is limited to the award of monetary damages; it may grant neither injunctive nor declaratory relief. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *King*, 395 U.S. 1.

The court of appeals correctly determined that this litigation is an action for breach of contract, whose resolution requires interpretation of clauses in the underlying agreement to determine the government's rights to certain

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[3]Although a district court has jurisdition to adjudicate contract claims of less than $10,000, in exercising that jurisdiction, it lacks authority to consider requests for declaratory and injunctive relief. *Richardson* v. *Morris*, 409 U.S. 464, 466.

information (Pet. App. A-9).[4] At issue are the Air Force's rights to allegedly proprietary data initially disclosed to it under a trade secret licensing agreement (Pet. App. A-11, n. 7). The case therefore falls within the Tucker Act and jurisdiction lies in the Court of Claims,[5] not in the district court (Pet. App. A-9 to A-11).[6]

2. Petitioner contends (Pet. 22-24) that the district court had jurisdiction to entertain this action under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702. It argues that the contracting officer's decision to strike the limited rights legend constituted a "sanction" and was therefore "agency action" reviewable in the district court. 5 U.S.C. 551(10)(D), (13). But the court of appeals properly rejected this argument, determining that in enacting the APA, Congress did not intend to enlarge by implication the narrow waiver of sovereign immunity granted by the Tucker Act (Pet. App. A-13).

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[4]Petitioner's contention (Pet. 13-14) that the procedures followed by the contracting officer denied it due process is simply an effort to recast its contract claim in constitutional verbiage. This agrument merely restates petitioner's position that the contracting officer's action constituted breach of contract.

[5]Since the verified complaint alleged that the amount in controversy exceeded $10,000, this action could only be brought in the Court of Claims.

[6]Where the government uses another's trade secret beyond the scope of the license, the owner's rights stem from the violation of that agreement. The government may be sued for breach of contract but not in tort under the Federal Tort Claims Act. 28 U.S.C. 2680(h); *Woodbury* v. *United States*, 313 F.2d 291 (C.A. 9); *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145 (C.A. D.C.).